IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1209 OF 2005

1.Bharat Kanakia of Mumbai,)
2.)
)
)
)

entrusted to or placed at the disposal of Authority for the management and use for the purpose of the Act. Similarly, the occupants other than tenants/occupants of the very same building shall be evicted under the provisions of Section 66 read with Section 103 (J) of the MHADA Act, 1976. The learned Authority relied upon the order of this Court dated 27th February, 2002 in Writ Petition No.1478 of 1999. By virtue of that order the petitioners herein and respondent Nos. 6 and 7 have to be evicted.

2. A few facts which are necessary for deciding the controversy may now be set out:-

. On 8th August, 1990 the Mumbai Building Repairs and Reconstruction Board, hereinafter referred to as the MBRRB issued a Letter of Intent to Shailesh Dave, Respondent No.4 landlord of the building for redevelopment of the building known as Bharat Kunj situated on Sion-Matunga Road, Sion (West),Mumbai. On 10th January, 1991 MBRRB issued NOC for redevelopment in favour of Shailesh Dave. It is the case of the petitioner that between October, 1991 to May, 1993 Mukund R. Dave surrendered his tenancy in favour of Shailesh Ramniklal Dave and by agreement of 2nd October, 1991 Shri Ramakant Ramniklal Dave agreed to give up and forego whatever rights, title and interest in the said premises for consideration. Similarly by an agreement dated 5th January, 1993 and deed of assignment dated 11th May, 1993 Bharat

Ramniklal Dave assigned his right in favour of Shailesh Ramniklal Dave. Thereafter Shri Shailesh Ramniklal Dave assigned his rights in favour of Rajendra R. Shah HUF. These rights were assigned in favour of Sonal Kanakia wife of petitioner No.1 and Rajendra R. Shah HUF the petitioner No.2, pursuant to which they occupied their respective flats and also paid rent to Shailesh Dave.

. In October, 1993 all the flats in the building were vacated and in December, 1993 the building was demolished. In June, 1999 Suit No.3770 of 1999 came to be filed by Rekha S. Kulkarni and another against Shailesh Dave and Bharat Dave for specific performance of the agreement between her and Shailesh Dave. The petitioners were also party to the suit. On 7th July, 199 consent terms were filed in this Court and a decree was passed in terms of the consent terms. The consent terms inter alia provided that the petitioners were to complete the construction of the building at their own costs which was a minimum of Rs.1 crore. This would be reimbursed by permitting the petitioners to sell 5 flats in the building. In the event of a shortfall, Shailesh Dave would make good the same and the petitioners and other tenants of the building would be provided with flats in a new building in accordance with the agreement entered into with Shailesh Dave and confirmed by the various deeds of confirmation. Shailesh Dave and Bharat Dave signed the consent terms. In August, 2000 the construction of the building was completed and possession of the various flats

was handed over to the persons mentioned in the said consent terms. On 6th September, 2000 a Co-operative Society by name Abhinandan Swami Co-operative Housing Society comprising of the occupants of the building was registered. The petitioners are members of the society and according to the petitioners Dave Brothers are not. On 20th October, 2001 a fresh list of tenant/occupants was submitted by the Architect to MHADA. On 4th December, 2001 NOC was issued by MBRRB to Shailesh Dave for applying for and obtaining the occupation certificate from the B.M.C. for the new building for rehabilitation of the tenants/occupants of the old building on the terms and conditions stipulated therein. In an affidavit filed by Shailesh Dave dated 11th July, 2002 in Suit No.3770 of 1999 Shailesh Dave stated that he was satisfied with the accounts submitted by the petitioners in respect of the expenses incurred for the construction of the new building and if any person had any claim in respect of the said property, he would be solely liable for the same.

3. It appears that Mukund Dave, Respondent No.3 filed a complaint dated 10th October, 2002 to MHADA stating that he has not been allotted the flat in the new building and seeking intervention of MHADA. On 14th July, 2003 a letter was addressed by Shailesh Dave to the Chief Officer of MHADA wherein he has set out that his brothers had surrendered their interest in their respective premises for valuable consideration and his brothers did not have any rights in the

new building and it was also set out therein that his brothers Bharat Dave and Mukund Dave had pressurised him to execute a Power of Attorney for representing him before various authorities including MHADA. Dave Brothers through their Constituted Attorney filed a petition before this Court being Writ Petition No.2661 of 2003. The petitioner No.1 herein filed an affidavit in the petition placing on record the various facts pertaining to the transfer/assignment of the tenancy rights in favour of the petitioners and their family members by the Dave brothers for valuable consideration and also pointed out that subsequently they had paid rent to Shailesh Dave and had vacated the premises in their occupation and handed over the same for the purpose of demolition. In January, 2004 according to the petitioners affidavit was filed on behalf of MHADA in which it was expressly stated by the Executive Engineer that an enquiry had been conducted in which it was revealed that Dave Brothers had relinquished their tenancy rights as well as their right to flats in the new building in favour of the petitioner by executing various documents. By order dated 25th February, 2004 this Court directed MHADA to consider the complaint dated 10th October, 2002 and after hearing all concerned parties including the petitioners to pass appropriate orders in accordance with law. According to the petitioner No.1 he filed reply on 31st August, 2004 in answer to the complaint filed by the respondent No.3. The impugned order thereafter came to be passed under the provisions of Section 66 read with Section

103-J of the MHADA Act.

4. A reply has been filed on behalf of the Dave Brothers by Pratibha Dave as the Constituted Attorney. In her affidavit the contentions urged on behalf of the petitioners have been contested. It is pointed out that under the MHAD Act an Appeal lies against the order which has to be filed before the Appellate Officer as provided by the provisions of sub-section (1) of Section 70 of the MHAD Act. It is also pointed out that when there is an alternate remedy this Court would not exercise its discretionary jurisdiction under Article 226 of the Constitution of India. In answer to the affidavit in rejoinder filed by Bharat Kanakia, the petitioner No.1, an additional affidavit was filed on 24th June, 2005 in which amongst others it is sought to be pointed out that merely because the provisions under which the power was exercised is wrongly set out is of no consequence and that in fact the order can be said to be made under Section 95A of the MHAD Act.

5. At the hearing of this petition on behalf of the petitioners their learned Counsel submits that (1) the order is without jurisdiction in as much as Section 103J of the MHAD Act does not apply to the facts of the present case. Section 103J only applies in case of acquisition under Section 103B. In the instant case the redevelopment of the building is not pursuant to any acquisition under Section 103B and

consequently under Section 103J will not apply; (2) Even if the case of the respondent No.3 is accepted that the order is passed under Section 95A of the MHAD Act even then the Chief Officer of MBRRB did not have jurisdiction to pass the impugned order. Sub-section (2) of Section 95A applies only to the property of the Board and not to private property and consequently neither sub-section (2) nor sub-section (3) of Section 95A apply conferring jurisdiction on the Chief Officer of MBRRB to pass the impugned order. Assuming that Sections 103B to 103J were applicable it is submitted that by virtue of Section 103-I(6) of the MHAD Act MHADA/MBRRB was required to direct Respondent No.3 to file a Civil Suit to establish his claim to the premises as an alleged occupier thereof. MHADA/MBRRB had no jurisdiction to decide the issue as to who was the occupier of the said premises by virtue of Section 103-I(6) (4) If MHADA had jurisdiction to decide this issue, then MHADA was bound to consider the facts on record as also agreements executed by Dave brothers transferring/assigning their rights and claims in respect of the premises in the old building as well as the new one in favour of the petitioners and their associates. The fact that the petitioners were in possession of the flats and had paid rent to the landlord in respect of some of the flats prior to and at the time of the demolition of the building. The fact that the petitioners and their associates who had surrendered the premises in the old building for the purpose of demolition. The fact that the petitioners and their associates were allotted premises in the

new building under a consent decree dated 7th July, 1999 of this Court to which Shailesh Dave and Bharat Dave are parties; (5) That MHADA itself had filed an affidavit in this Court recognising the fact that Dave Brothers had transferred their interest and rights in the premises to the petitioners and their associates. Shailesh Dave had filed an affidavit in this Court pursuant to the consent decree, accepting the accounts submitted by the petitioners and stating that he was solely responsible for any claim made by any person in respect of the said property. There are other facts including that the petitioners and their associates are put in possession of the premises as members of the society. On behalf of the petitioners their learned Counsel therefore, submits that it was not within the jurisdiction of the Officer who passed the order to have passed the order under Section 66 read with Section 103J of the MHADA Act, 1976.

. On behalf of the contesting respondents it is submitted that mere quoting of wrong section is of no consequence and it was possible for the Chief Officer to pass an order under Section 95A of the MBRRB Act.

6. With the above we may now have a look at the provisions of the Act. It may be pointed out that the permission for redevelopment was granted in favour of Shailesh Dave according to the modified D.C. Regulation No.37(7). One of the conditions was that all the occupants of the old building

shall be reaccommodated in the redeveloped building. Regulation 33(7) as modified grants an additional F.S.I. of 2.5 where the building is to be reconstructed for rehabilitation of the existing tenants plus incentive FSI as specified in Appendix -C whichever is more. Section 66 is a power conferred on the Competent Authority to evict certain persons from authority premises. The Competent Authority has been defined as the Officer appointed to be Competent Authority under Section 65. Authority premises have been defined under Section 2(4) to mean any premises belonging to, or vesting in the Authority, or taken on lease by the Authority, or entrusted to, or placed at the disposal of, the Authority for management and use for the purposes of this Act. By an explanation the Authority premises includes any premises taken by a person from the Authority under hire-purchase agreement, during the period any payments are to be made by such person to the Authority under such agreement or until such agreement is duly terminated. Chapter VI contains the provisions to evict persons from authority premises and recover dues. Chapter VIII on the other hand provides for repairs and reconstruction of dilapidated buildings. In other words the Act itself makes out clear distinction between the authority premises on the one hand and dilapidated buildings on the other which are not authority premises. The various provisions of Section 66(1) (a)would indicate the powers to evict a person authorised to occupy any authority premises. Sub-section (1) (vi) (b) of Section 66 provides the manner of

service on a person who is in unauthorised occupation or in authority premises. Sub-Section (2) provides the procedure to be followed before an order is made under sub-section (1). The other provisions are in the matter as to when the order has to be passed and executing the order after a person is directed to vacate but does not vacate the premises. This Section, therefore, would clearly not be applicable to the building which is the subject matter of the present case as it is not authority premises. Section 103J is a power for eviction if the Co-operative Society unauthorisedly allotes to any person any tenement which is to be allotted under the provisions to dishoused person. Again this provision is found in Chapter VIII-A which is the provision which provides for acquisition of such properties of a Co-operative Society or occupier. This Section, therefore, applies when the acquisition of cessed property of occupier. That is not the position in the instant case as it is the landlord who constructed the building and took upon himself to house the occupants in the reconstructed building. The action, therefore, of the Chief Officer of MBRRB in issuing the impugned order was clearly without jurisdiction and on that count itself it has to be set aside.

7. We may now examine the contention as urged on behalf of the contesting Respondents that it was merely because a wrong Section was quoted as the source of power is of no consequence if the power can be located. That power can be

located under Section 95A. Section 95A contemplates summary eviction of occupiers in certain cases. It provides that where the owner of a building or the member of the proposed Co-operative Housing Society of the occupiers of the said building, submits a proposal to the Board for reconstruction of the building, after obtaining the written consent of not less than 70 per cent of the total occupiers of that building and a No Objection Certificate for such reconstruction of the buildings is issued by the Board, to the owner or to the proposed co-operative housing society of the occupiers, as the case may be, then it shall be binding on all the occupiers to vacate the premises. In other words this is the power before reconstruction. Sub-section (3) confers a power on the Board to summarily evict an occupant occupying any premises, land, building or structure of the Board unauthorisedly or without specific written permission of the Board. It is not the case of the contesting respondents that the premises or the building belongs to the Board. As such sub-section (3) would be inapplicable. Sub-section (4) only provides for the consequences of refusal to vacate or obstructing eviction. It will, therefore, be clear that Section 95-A would not be attracted. Even from the contention of the contesting Respondents it would be clear that the Chief Officer of MBRRB could not have exercised the powers under Section 95-A as the said Section was not attracted and even otherwise it is the power of the Board.

8. It was sought to be contended and my attention was invited to a Judgment of the Division Bench of this Court in the case of **Prabhawati Tokersi Chheda** vs. Maharashtra Housing & **Area Development Authroity & Ors., 2002(4) Bom.C.R.579** to point out that when the Court permits the landlords/owner to develop he acts as agent of the Board and in these circumstances it will be open to this Court in the exercise of its extra ordinary jurisdiction to direct eviction of the unauthorised occupant and hand over the possession of the premises to the persons entitled to in terms of the names included in the N.O.C. for development. Considering the controversy involved herein it is not necessary to go into that issue. Even if such a power could be located the question is whether this Court should exercise its extra ordinary jurisdiction. In the first instance the petition is not by the persons who claim right to occupation. The petition is by persons who are occupiers and whose eviction has been ordered by the Chief Officer. Even otherwise it is not as if in every case, this Court would exercise its extra ordinary jurisdiction even if the persons whose names are included in the No Objection Certificate should approach this Court. It will depend upon facts of each case and the question of facts whether disputed or not. In the instant case there are disputed questions of fact including the contention as urged by the petitioners that the Dave Brothers have assigned rights in their favour and further that they are in occupation pursuant to a consent decree in a suit to which

two of the Dave Brothers were parties. That being the case even if the persons entitled had moved this Court prima facie it would be difficult for this Court to exercise its extra ordinary jurisdiction. It is not as if such persons are helpless and/or without any forum. Section 103(1)(vi) is the answer. Sub-section (vi) would apply and the controversy can be resolved by a Civil Court. The Section need not be read to mean only disputes previous to construction. It can even be subsequent to the construction. Even otherwise the ordinary remedy of a party is to file a suit for declaration and possession of their rights and that right has not been taken away. In the circumstances the petition as filed will have to be allowed.

9. Accordingly Rule made absolute in terms of prayer clause (a). It will be open to the contesting respondents to claim their rights, if any, before a Competent forum including a Civil Court. In the circumstances of the case there shall be no order as to costs.

(F.I.REBELLO, J.)